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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1246

UNITED STEELWORKERS OF AMERICA, AFL-CIO and its Local Unions 2601, 2602, 2603, 2604 and 3144,

Petitioners,

v.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK and VELVET BROWN, JR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT

The petition in the instant case, filed by the United Steelworkers and four of its locals (hereinafter collectively referred to as the "Union"), seeks review of the identical decision from which petitioner Bethlehem Steel Corporation seeks review in 72-1004. Because this second petition raises very little new (and nothing of merit) we incorporate by reference all of our brief in opposition to

the petition for certiorari in 72-1004 as our primary reply to this new petition by the company's Union allies. We shall reply briefly, however, to each of the reasons asserted by the Union for granting a writ:

I.

PRIVATE LITIGANTS ARE NOT BOUND TO SUFFER DISCRIMINATION BECAUSE THE ATTORNEY GENERAL DID NOT SEEK RELIEF AGAINST IT.

The Union, without citing any case authority, asserts in its petition the same arguments raised by the company that these recalcitrant law breakers were granted a irrevocable license to continue to discriminate against black victims of their asserted acts of discrimination because the attorney general brought a law suit in which he did not seek relief against these unlawful practices. The Union concedes that the attorney general did not seek such relief (Petition at pages 5-6) but argues that the interest in repose outweighs the national policy against race discrimination embodied in the Civil Rights Act. This order of priorities is out of touch with the intent of Congress. See *Newman v. Piggie Park*, 390 U.S. 400, 402 (1968) (national policy against racial discrimination is "of the highest priority").

The Union also argues that it is "cruel" to the white workers to cut off the "tail" of discrimination one piece at a time. The simple answer to this is that if the tail were not so long it would not require so much cutting. These unions which supposedly represent the black workers at Bethlehem have acted in concert with the employer to engage in a pattern of discrimination which both the District Court and the Court of Appeals in *United States v. Bethlehem Steel* charitably termed "sorry". After years

of continuing to discriminate against workers whom it is bound by law to represent and appearing in every forum to oppose an effective remedy to the complex problems it has created, the Union has the affrontery to characterize the victims' demand for relief as "cruel."

It is the Unions themselves, with the company, who have created the problem and resisted any effective solution to it. Their *whole* membership would have been better served if the Union had five years ago represented *all* of their members interests. It was the Unions' duty then as it is now, not to seek to perpetuate discrimination, but seek a solution fair to all.

We believe that this Court, by vacating the stay in this case (order of March 26, 1973) has already seen the frivolousness of petitioners' position. In any case for the reasons stated here and in our reply brief and in 72-1004, the Union's petition here is without merit and not adequate grounds for granting a petition for a writ of certiorari.

II.

THE ISSUE OF THE PROPER REMEDY IS NOT NOW BEFORE THE COURT.

The Union also argues that the law does not allow a remedy to the victims of a discriminatory recall from the layoff system because to give the black victims of discrimination fair treatment will upset the expectations of the white workers to continue to benefit from the discrimination. It calls the remedy "bumping" and cites authority for the proposition that "bumping" will not be allowed. Its position on the merits of this issue is frivolous as its failure to cite authority and distinguish directly contrary authority on point indicates. Nowhere in its discussion of this issue does the Union even

mention *U.S. v. Hayes International*, 456 F.2d 112 (C.A. 5, 1972), which specifically states that modification of a discriminatory recall from layoff system is mandated by Title VII. We respectfully submit that the principles enunciated in *Hayes* and the long line of cases cited in our brief of 72-1004 states the controlling law with respect to this issue.

The merits aside, however, the simple answer to this argument at this point is that this issue is not before the Court. The court below ordered that this case be remanded to the District Court to fashion "full, fair, just and adequate relief." Until the District Court has had an opportunity to hold a hearing and order such relief, there is no issue of "bumping" before this Court. What the Union is asking this Court to do is to decide in the abstract and without an order from the district court whether some hypothetical relief would be appropriate. It is surprising that attorneys with the experience of counsel for the Union would ask this Court for an advisory opinion.

CONCLUSION

For the foregoing reasons and for the reasons stated in our reply in the petition for 72-1004, the petition for certiorari should be denied. Indeed, in the special circumstances in this case, including the attempt by the Union to prolong the stay in this case (See Application No. A-920 (USCA2 #72-1420) to vacate stay, granted March 26, 1973) this Court should use its powers under Supreme Court Rules 56(4) and 57(7) and Section 706(k) of Title VII of the Civil Rights Act of 1964 (42

U.S.C. §2000e-5(k)) to award respondents damage for delay, double costs and attorneys fees[1] against both petitioner here and in 72-1004.

Respectfully submitted,

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[1] *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 352 (8th Cir. 1972) (cert. granted); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Malone v. North American Rockwell Corp.*, 457 F.2d 779 (5th Cir. 1972); *Parham v. Southwestern Bell Co.*, 433 F.2d 421, 2 FEP Cases 1017, 1024 (8th Cir. 1970); *Fogg v. New England Tel. & Tel. Co.*, ____ F. Supp. ____, 5 FEP Cases 8 (D. N.H. 1972).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Steelworkers of America, AFL-CIO, and its Local Unions 2601, 2602, 2603, 2604 and 3144 (collectively "the Union") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court are not yet reported. They are reprinted in Appendix B to the petition for writ of certiorari in No. 72-1004, filed by Bethlehem Steel Corporation ("Bethlehem"), the Union's co-defendant.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 3, 1972. Bethlehem's timely petitions for rehearing and rehearing *en banc,* which were joined by the Union, were denied on December 4 and December 12, 1972, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, following a "pattern or practice" action instituted by the United States under Title VII of the Civil Rights Act of 1964, individual employees may file a Title VII action seeking additional relief—beyond that obtained by the United States—for the violations found in the "pattern or practice" action.

2. Whether, in reforming seniority systems which perpetuate the effects of past discrimination and thereby violate Title VII, courts are empowered to fashion remedies which displace incumbents from their jobs?

STATUTES

The statutory provisions involved, Sections 703, 706 and 707 of Title VII of the Civil Rights Act of 1964 (Pub. L. No. 88-352, 78 Stat. 255, 42 U.S.C. § 2000e-2, 5 and 6), together with subsequent amendments thereto (86 Stat. 103 (1972)), are reproduced in relevant part in Appendix A to Bethlehem's petition.

STATEMENT OF THE CASE

On June 21, 1971, the Court of Appeals for the Second Circuit rendered its decision in *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971), directing a massive revision of the seniority system at Bethlehem's Lackawanna Plant. On August 21, 1971, the Court granted the

parties' joint motion for clarification and specified the precise terms of the amended decree to be entered by the district court. On September 14, 1971, the district court signed an amended decree in the form dictated by the Court of Appeals.

Thereafter, on October 29, 1971, six employees of the Lackawanna Plant instituted the present action, seeking additional changes in the seniority system.[1] On that same date, they moved for a preliminary injunction instituting, *pendente lite,* the addtional seniority changes sought in their complaint. Plaintiffs proferred no new evidence; they relied entirely upon the record made in *Bethlehem.* They contended that the Court of Appeals had not gone far enough in curing the violations shown by that record.

The Attorney General's Action

Bethlehem was a "pattern or practice" action instituted by the Attorney General pursuant to § 707 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6. That section authorizes the Attorney General to sue whenever he finds that there is "a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII, and to seek "such relief . . . as he deems necessary to insure the full enjoyment of the rights herein described."

The Attorney General's suit in *Bethlehem* was comprehensive, reaching every aspect of the employment situation at the Lackawanna Plant. It challenged the Company's hiring policies, apprenticeship practices, selection of supervisory personnel, testing practices and, more relevant to the instant case, the assignment of employees to production and maintenance jobs in the Plant.

The Government alleged, and proved, that until October 1, 1967, the Company had followed a practice of assigning

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[1] The complaint also seeks backpay, but that aspect of the case has yet to be adjudicated and is not now before this Court.

newly-hired black employees predominately to only 11 of the 74 departments in the Plant. It further alleged, and proved, that the departmental seniority system in effect throughout the Plant perpetuated the effects of this discriminatory assignment practice. While employees were entitled to transfer to permanent vacancies in other departments, they normally would suffer a reduction in pay (because vacancies normally arise in the bottom jobs in a department) and would be treated for seniority purposes (promotion and demotion) as newcomers upon their transfer. The Government alleged, and proved, that these attributes of the seniority system had two deleterious effects: (1) discriminatees were "locked in" to the departments to which they had been initially assigned, because the adverse pay and seniority consequences deterred them from exercising their contractual right to transfer, and (2) discriminatees could never reach their "rightful place"—the place they would be occupying had they never been discrimanted against—because upon transferring they would forever promote behind junior employees who had entered the new department before them.

To eliminate these barriers to equal employment opportunity, the Government sought, and obtained from the Court of Appeals,[2] a two-fold remedy: discriminatees (i.e. black employees initially assigned to the 11 Departments prior to October 1, 1967) would be assured "rate retention" upon transferring to another department (i.e., if the job to which they transferred paid less than their former job, they would continue to receive their former rate until they promoted to a job paying more than their former rate) and "seniority carryover" (i.e. the use of plant seniority, rather than departmental seniority, for purposes of moving within their new department).

Much of the Court of Appeals' opinion in *Bethlehem* was

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[2] The district court had found the Government's proposed remedy unnecessarily disruptive of Plant operations, a finding which was reversed by the Court of Appeals.

devoted to delineating the parameters of the "seniority carryover" remedy, and it is that aspect of the opinion with which the present plaintiffs are unhappy. In its opening brief to the Court of Appeals in *Bethlehem,* the Government had argued that members of the affected class should be allowed to compete on the basis of plant seniority "for all purposes". The company and the union, in their answering briefs, listed a number of aspects of such a remedy which they claimed would be inequitable. One of the aspects which they cited was with respect to layoff-recall situations. They pointed out that, when the company was ready to recall employees following a layoff, the Government's proposed remedy would permit members of the affected class to use their plant seniority to vault into jobs they had never held before, ahead of the white and black employees who had held those jobs prior to the layoff. In this manner, the company and the union argued, the occurrence of a layoff followed by a recall would—under the Government's proposed remedy—have the effect of displacing, or "bumping", employees from the jobs which they had held at the time of layoff.

The Government, in a reply brief, acknowledged the force of this argument and agreed that a modification in its proposed remedy might be appropriate to exclude layoff-recall situations. Thus, its reply brief stated (page 19):

> "The United States asks only that black transferees and whites compete on the basis of plant seniority for vacancies occurring in the normal course of business —i.e., vacancies caused by an incumbent dying, retiring, or transferring. For this reason, it would be acceptable to the Government if the decree were to provide that, as workers are recalled following a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to the layoff."

In its opinion, the Court of Appeals—granting the major seniority revisions sought by the Government—made an

express exception for the layoff-recall situation. Emphasizing that "the relief sought by the Government is moderate" (446 F.2d at 659), the Court stated:

> "[T]he right of transfer or to bid upward, under the Government's proposals, would not be unlimited or unconditional. A transfer would only be to fill vacancies; there would be no bumping of 'white' employees out of a job." *(Ibid).*

The Court then recited that "relief under the Act should give discriminated employees, *as future vacancies arise,* the opportunity to obtain the jobs that they would have earned had there been no discrimination." (*Id.* at 660). (Emphasis added).

The Court of Appeals went on to state that "the crucial question must be whether the basic goal of the seniority system will necessarily be frustrated by these remedies." (*Id.* at 662). It found that it would not be, because *inter alia,* "under the Government's proposals, a transferee has priority rights only with respect to jobs in formerly 'white' departments *that are not otherwise filled in the normal seniority procedures."* (*Id.* at 663) (Emphasis added).

The Court of Appeals further stated:

> "We do not say that Appellees' concerns over the effects of . . . seniority carryover are manufactured . . . But most of them can be met by the carefully limited order suggested by the Government . . . [B]ecause plant seniority will *only* be used in bids upwards for *vacancies occurring in the normal course of business,* i.e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job, an employee will not be 'bumped' out of his job in such situations by a transferee. Regarding displacements caused by layoffs, the Government suggests that, *as workers are recalled following a layoff, all employees should assume*

the same positions relative to each other as they held immediately prior to the layoff. Although plant seniority of transferees will remain as a factor in layoffs, this suggestion will limit the speed with which a transferee can be promoted and *the unsettling effects of seniority carryover during periods of layoff and recall.*" (*Id.* at 663-664; Emphasis added).

Finally, the Court's opinion, in detailing the ingredients of an amended decree, stated as follows (*Id.* at 666):

> "A transferee shall be permitted to exercise plant seniority for all purposes following transfer, *except as otherwise set forth herein . . . As workers are recalled after a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to the layoff.*" (Emphasis added).

Subsequently, the Court of Appeals granted a motion to clarify its opinion and specified the precise language which should appear in the amended decree. That language carried forward the express "exception" for layoff-recall situations which had been contained in the opinion. Thus, paragraph 5(a)(2) of the amended decree provided in pertinent part:

> "Any employee seeking such a transfer must submit his request in writing within ninety (90) days after the offer . . . Employees requesting such transfers shall be transferred in accordance with their plant service dates to the first *available permanent vacancy* in any department they have designated . . . *For the purpose of the preceding sentence an 'available permanent vacancy' is a permanent vacancy which is not filled in accordance with normal seniority practices.*" (Emphasis added).

Likewise, paragraph 5(a)(4) of the amended decree, after stating the general principle that members of the af-

fected class would be able to use their plant seniority, contained the following "exception":

> "except that when workers in the transferee's unit in his new department are recalled after any layoff from the unit all employees shall return to the same positions relative to each other as they held immediately prior to their layoff . . ."

While this language appeared to the union to be crystal clear, it nevertheless sought to avoid the danger of any possible confusion at a later time by securing from the Government its written agreement that the Court of Appeals' opinion did not permit members of the affected class to transfer into a department and assume jobs to which laid off employees were awaiting recall:

> "We agree with you that the phrase 'in accordance with normal seniority practices' means that persons on layoff status in departments other than the eleven (11) designated departments will be entitled to recall ahead of transfers by members of the affected class from the eleven (11) designated departments." (27a).

The Present Action

Judge Henderson, in ruling upon the motion for preliminary injunction in the instant case, concluded that the relief sought by plaintiffs—the right to transfer between departments into jobs from which other employees had been laid off and were awaiting recall—was inconsistent with, and precluded by, the Court of Appeals' decision in *Bethlehem.*

On appeal, the court below reversed. It found that in *Bethlehem* the Government had acquiesced in its reply brief to treating layoff-recall situations as an exception to the plant-seniority remedy and that, accordingly, "the Government expressly did not seek the very relief plaintiff-appellants seek here" (Appendix B-1 to Bethlehem's petition, at p. 322). It then reasoned that:

"For purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it, . . . nor have interests such as to be in privity with the Attorney General . . . Therefore, the judgment in the previous case does not have conclusive force here . . .

"Nor, for the reasons explained above—namely that the Government did not seek relief in the case of recall after layoff—does the earlier decision bind us on the basis of stare decisis . . ." (*Ibid*).

Finally, the court below concluded that Congress did not intend a "pattern or practice" suit to preclude private actions seeking additional relief for the same violations. (*Id.* at 323-325).

With respect to the merits of the private plaintiffs' action, the court below rejected the defendants' argument that permitting discriminatees to transfer to jobs to which laid-off employees are awaiting recall would constitute a form of displacement beyond the scope of relief authorized by Title VII. (*Id.* at 325-326). The case was remanded to the district court "for the purpose of enabling it further to explore the facts and adjust the relief accordingly" (*Id* at 328).

REASONS FOR GRANTING THE WRIT

This case presents two issues of major importance in the development of the law under Title VII—issues which will arise repeatedly and as to which guidance from this Court at the earliest moment is desirable.

I

The first issue is whether employees can bring private actions seeking additional relief for violations which have already been found and remedied in a Government "pattern

or practice" action. In our view, this is a question to be answered not in terms of common law principles of res judicata, collateral estoppel and stare decisis, but rather in terms of Congress' conception of the role of the "pattern or practice" action in implementing the objectives of Title VII.

Congress constructed the "pattern or practice" action as one in which the Government would secure all of the relief "necessary to insure the *full* enjoyment of the rights herein described." Section 707(a), 42 U.S.C. § 2000e-6(a) (emhasis added). We believe that the Act should be construed to preclude private actions for additional relief for the very violations alleged and found in the Government's action. The contrary decision of the court below threatens two principles of paramount importance to the implementation of Title VII.

(a) Recognizing that the problems of employment discrimination were so widespread as to tax the capacity of the judiciary to bring about their solution on a national basis, Congress viewed conciliation as the backbone of the enforcement machinery of Title VII. § 706(a), 42 U.S.C. § 2000e-5(a); *Dent* v. *St. Louis-San Francisco Ry. Co.*, 406 F.2d 399 (5th Cir. 1969). But conciliation can be an effective device only if the parties know that their efforts, if successful, will provide a final solution of their problems. Employers and unions will fear entering into conciliation agreements with the Government if such agreements do not preclude private actions, for such agreements would simply be concessions of wrongdoing upon which private litigants could build. Thus the Government's capacity to cure employment discrimination through conciliation is threatened if, as the court below has held, the Government cannot offer finality in return for curative action.

(b) The ordinary values of finality take on extraordinary dimension when remedial action in the seniority area—the most widespread and most complex source of Ttitle VII

actions—is concerned. Every seniority change causes a social upheaval, for it takes away the job expectations of some employees as it hands them to others. "[E]very change in the status quo may cause personnel problems since employees with vested interests adversely affected by the change will almost certainly be displeased." *Bing* v. *Roadway Express,* 444 F.2d 687, 691 (5th Cir. 1971). That upheaval undoubtedly is necessary to achieve Title VII's end, but it is not necessary that it occur repeatedly. Repeated seniority changes, like the proverbial cutting off the dog's tail an inch at a time, are a cruel, divisive, and wholly unnecessary means to implement the statutory objectives.

The implementation of the seniority changes mandated in *Bethlehem* has been arduous, time-consuming, and the cause of much confusion within the Plant. Enormous efforts have been made by all parties to educate the employees—black and white—to the revolutionary changes which *Bethlehem* wrought. Initially, the changes were met with considerable employee unrest, including picketing of the federal courthouse. The Company has had to institute extremely complex administrative procedures in order to implement the new seniority rules. Now that that process has been long underway, it will be disastrous if the rules are to be changed yet again. When the employment expectations of thousands of employees are at stake, it is essential that disruptive changes be accomplished once and for all, and that litigation come to rest.

Accordingly, whether Congress intended to allow these consequences, by permitting private actions seeking relief supplementary to that obtained in "pattern-or-practice" actions, is an important question which has not been but should be decided by this Court.

II

The second issue is whether Title VII authorizes remedies which cure prior discrimination by displacing employees from their jobs. The court below held that one such remedy

—allowing discriminatees to take jobs to which laid off employees are awaiting recall—is not only permissible but proper under Title VII.

The remedy sanctioned below will prevent employees whose jobs are temporarily discontinued from returning when those jobs are reactivated. To be sure, an employee whose job is never discontinued would not be bumped. But an employee so unfortunate as to have his job temporarily interrupted by a downturn in the Company's business would by that fortuity lose forever his incumbency—he would remain on layoff until every more senior discriminatee in the plant has been offered an opportunity to fill his job. That displacement is no less real, and no less devastating to the affected employee, than displacement from active work.

The displacement effect sanctioned by the court below is in conflict with the "rightful place" approach which has been adopted by other courts (and indeed by the court below in its earlier *Bethlehem* decision) as the proper approach to remedying Title VII violations.

The text of Title VII sheds little light upon the nature of the remedies to be provided. It merely directs the court to "order such affirmative action as may be appropriate." § 706(g), 42 U.S.C. § 2000e-5(g). Following passage of the Act, several years elapsed before any decisions were rendered defining the appropriate remedial approach. During that period, three quite different approaches were widely debated.

At one extreme was the displacement, or "freedom now", approach, which would permit discriminatees, assuming they had the requisite ability, immediately to claim the jobs which they would have been occupying had there been no discrimination. A black employee who had been discriminatorily assigned to one seniority unit would be permitted to transfer to a "white" unit and bump incumbent white employees with less plant seniority. The argument in favor of this approach, of course, was that it provided the quick-

est means of eliminating the present effects of past discrimination.

At the other extreme was the "status quo" approach, which would require discriminatees who transfer to a "white" unit to remain forever behind those employees who entered that unit before them. The argument in favor of this approach was that it best effectuated the Congressional desire, expressed at the time of passage of Title VII, not to disturb existing seniority rights.[3]

Between these extremes was the "rightful place" approach, which ultimately obtained virtually universal judicial sanction. This approach was first advocated in a Harvard Law Review note which has been widely credited as the source from which the judicial unanimity stemmed.[4] Note,

[3] "Neither would seniority rights be affected by this Act." 110 Cong. Rec. 6564 (1964) (remarks of Senator Kuchel). "[I]t has been asserted that Title VII would undermine rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect." Department of Justice Memorandum presented by Senator Clark on April 8, 1964, Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, p. 326. "Mr. President, it is clear that the bill would not affect seniority at all." Statement by Senator Clark on April 8, 1964, *Id.* at p. 327. "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." Interpretative Memorandum of Senators Clark and Case, *Id.* at p. 329. "Seniority rights are in no way affected by the bill . . . The bill is not retroactive, and it will not require an employer to change existing seniority lists." Senator Clark's answers to Senator Dirksen's questions, *Id.* at p. 332. Senators Clark and Case were the floor managers of the bill.

[4] In *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), the first important remedy decision under the Act, Judge Butzner adopted the "rightful place" approach, stating that he had "freely drawn" upon the "perceptive analysis of the problem and its solution" contained in the Note. In *Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970), the first appellate decision discussing the remedy question, the Court adopted "rightful place" and declared that it "drew heavily" upon *Quarles* and the Note, *Id.* at 983, n. 2. In *Bethlehem*, the Court of Appeals adopted "rightful place", citing *Local 189* and the *Note*, 446 F.2d at 660.

Title VII, Seniority Discrimination and the Incumbent Negro, 80 Harv. L. Rev. 1260 (1967). Under "rightful place", discriminatees would not bump incumbent employees out of their jobs; rather, they would enter a "white" unit only when vacancies arose, but would *thereafter* use their plant seniority as future promotional opportunities arose to progress past junior whites to the job which they would have been occupying but for discrimination—their "rightful place."

The Note extensively analyzed the merits of "rightful place" as compared to "freedom now", and concluded that "the 'rightful place' remedy seems best adapted to the achievement of the title's purpose . . ." 80 Harv. L. Rev. at 1273. The Note listed the arguments in favor of "freedom now" and found them wanting (*Id.* at 1274-75):

> "[The argument for 'freedom now' is that] if all white workers are allowed to hold their present jobs regardless of past discrimination, then, even if the seniority system is modified to allow senior Negroes to bid for vacancies on the basis of their full seniority, they must wait until such vacancies occur and, while waiting, must continue to suffer economic loss resulting from discrimination. In plants where new jobs are not being created or where the employee turnover rate is low, the waiting period may be lengthy and the resulting losses correspondingly great. The 'freedom now' approach would avoid imposing these costs on Negro employees, but insofar as it would reverse job awards made before Title VII became law it seems vulnerable to the charge that it is retroactive. Further, although legislative history sheds little light on the question, it seems unlikely that Congress expected Title VII in any circumstances to operate directly to remove a White employee from his job. Finally, by merely modifying White expectations of future job movement, the 'rightful place' approach has a built-in quality of 'deliberate

speed'. Where White employees have relied on their seniority expectations in organizing their affairs, they would have some opportunity to adjust these arrangements in the light of the nondiscriminatory system. The 'freedom now' approach, in contrast, operates immediately and, in the case of particular individuals, may cause drastic reductions in present income. Moreover, it may be noted that, while any view of Title VII which impairs present White expectations will generate opposition, the 'freedom now' approach appears so radical and so abrupt as to foreclose any possibility of securing voluntary, if grudging, compliance with the Title's requirements."

This analysis was found persuasive by the Fifth Circuit in the first appellate decision addressed to the problem. *Local 189* v. *United States,* 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970). The Court analyzed all three approaches, and adopted "rightful place", *Id.* at 988:

> "A 'rightful place' theory stands between a complete purge of 'but for' effects [and] maintenance of the status quo. The Act should be construed to prohibit the future awarding of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification. White incumbent workers should not be bumped out of their present positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation."

Similarly, in *United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418 (5th Cir. 1971), the Fifth Circuit reiterated that Title VII does not authorize displacement remedies, even where reductions in employment levels augur little opportunity for black advancement without displacement:

> "Undeniably . . . the Terminal, like other railroads and connected facilities, remains in a period of reduced

> employment; consequently even the most beneficient employer would find elevation of qualified blacks into higher paying, more substantial positions an onerous task. *Certainly in this regard, the Terminal must continue to protect the jobs of incumbent whites.*" (451 F.2d at 437; Emphasis added).

The Court held that plant seniority had to be utilized in filling "vacancies" (451 F.2d at 458), but immediately emphasized (*Ibid,* n. 33):

> " 'Churning' or 'reshuffling' of jobs within a certain craft or class obviously does not produce a 'vacancy'. As the Government has agreed, the term must be considered in a realistic context."

See also *Long* v. *Georgia-Kraft Co.,* 455 F.2d 331, 334, n. 4 (5th Cir. 1972); *U. S.* v. *St. Louis-San Francisco Railway Co.,* 464 F.2d 301, 309-311 (8th Cir. 1972); *U. S.* v. *Georgia Power Co.,* 5 F.E.P. Cases 587, 602-03 (5th Cir. 1973).

The court below, in *Bethlehem,* had likewise seemed to adopt the "rightful place" approach, 446 F.2d at 660-61:

> "The correct criterion in fashioning a remedy under Title VII is what would be necessary to insure sufficient incentive to transfer so that the effects of past discrimination would not be perpetuated. In addition, the test here must also look to advancement after transfer, so that an employee can achieve his 'rightful place'. That is, relief under the Act should give discriminated employees, *as future vacancies arise,* the opportunity to obtain the jobs that they would have earned had there been no discrimination. [Citing, *inter alia, Local 189* and the Harvard Note].
>
> ". . . Such relief will remove any racially based constraints against transfer and allow the transferee, if qualified, to be promoted within a reasonable time to

his 'rightful place', a job in a 'white' department equal to that of his white contemporary who did not suffer a discriminatory assignment, *without displacing another employee from his present job.*" (Emphasis added).

The decision in the instant case—which countenances displacement in layoff-recall situations—thus runs counter to the "rightful place" remedial approach and conflicts with the decisions of those Courts of Appeals which have adopted "rightful place" as the correct approach to remedying Title VII violations.

CONCLUSION

For the reasons set forth hereinabove, petitioners pray that this Court issue a writ of certiorari to review the decision of the court below.

Respectfully submitted,

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APPENDIX

November 20, 1972

A. DANIEL FUSARO, ESQ.
Clerk, United States Court of
Appeals for the Second Circuit
Foley Square
New York, New York

Re: *Williamson* v. *Bethlehem Steel Corp., No. 72–1420*

Dear Sir:

We are in receipt of the Petition For Rehearing and Suggestion For Rehearing *In Banc* of Bethlehem Steel Corporation. The Union Defendants-Appellees would like to record that they join Bethlehem Steel Corporation in this petition, for the reasons stated therein.

I am enclosing three copies of this letter.

Yours very truly,

Michael H. Gottesman

[*Caption omitted*]

ORDER

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the fourth day of December, one thousand nine hundred and seventy-two.

A petition for a rehearing having been filed herein by counsel for the appellee, Bethlehem Steel Corporation.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

[*Caption Omitted*]

ORDER

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the twelfth day of December, one thousand nine hundred and seventy-two.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee, Bethlehem Steel Corporation, and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk